Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-779

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MONTANA

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: March 12, 1992

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law and policy center with more than 100,000 members throughout the United States.[1] WLF seeks to promote and protect the free

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[1] This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to combating what it believes to be abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar materials on the subject and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Rastelli v. Goodyear Tire & Rubber Co.*, (N.Y., argued Feb. 12, 1992); *Burlington, Vt. v. Dague*, No. 9-810, *cert. granted*, 60 U.S.L.W. 3513 (Jan. 27, 1992).

WLF believes that the discriminatory Montana venue provision in question in this case allows for forum shopping against out-of-state businesses. That forum shopping results in excessive damage awards which contribute to the cost of doing business, a cost ultimately borne by the affected company or its customers. A ruling in favor of the petitioner will not only reaffirm this Court's prior rulings on the issue, but also will contain abusive forum shopping within narrow limits.

SUMMARY OF ARGUMENT

In 1927 the Court established in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), that a state is forbidden from using its venue rules as a vehicle for discriminating between domestic corporations and foreign corporations with a fixed place of business and a registered agent in the state. Most state regulations and most state courts have followed that pronouncement. Montana, however, has created a venue scheme that discriminates in precisely the manner proscribed by the Court 65 years ago.

Montana creates two classes of defendants: residents and nonresidents. Its residents can only be sued in their

county of residence or where the tort occurred. More liberal venue -- indeed, a totally permissive, statewide venue -- is granted plaintiffs suing nonresidents, which includes all out-of-state corporations. Montana offers no rational basis for such a distinction.

Accordingly, resolution of this case does not require a radical departure from precedent, or even a significant step in the development of equal protection analysis. It requires only a reaffirmation of the Court's established precedent.

The second-class treatment afforded to out-of-state corporations results in a distortion of the judicial system. The "foreigner" -- the out-of-state corporation -- is subjected to higher litigation costs because it can be sued in counties remote from its principal place of business in Montana. The out-of-state corporation also becomes an easy target for higher jury verdicts, since it can be dragged into plaintiff-oriented venues from which domestic corporations are insulated. These excessive costs are ultimately passed on to consumers across the nation in the form of higher costs. Plaintiffs suing in Montana obtain an undue advantage at the expense of out-of-state corporations and the public. This distortion can be corrected by the Court's declaration that Montana's venue statute is unconstitutional.

ARGUMENT

I. MONTANA'S VENUE STATUTE DISCRIMINATES BETWEEN OUT-OF-STATE CORPORATIONS AND IN-STATE CORPORATIONS WITHOUT ANY RATIONAL BASIS FOR SUCH DISCRIMINATION

The Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), protects in-state corporate defendants from lawsuits in any county other than "the county in which the defendants or any of them reside at the commencement of the action." In contrast, Montana requires

an out-of-state corporation to defend lawsuits brought in any "county the plaintiff designates in the complaint." *Id.* The Montana legislature and courts have offered no rational basis to support this distinction, and none exists.

A. Montana's Venue Provisions Irrationally Disadvantage Out-of-State Corporations

Although there is little legislative history with which to explain this disparity of treatment, it appears to stem from the outdated concept, prevalent at the time of passage of Montana's venue statute, that out-of-state corporations were considered to have no legal existence beyond their state of incorporation, and could not be reached outside that state's boundaries. *See St. Clair v. Cox*, 106 U.S. 350, 354 (1882). Subsequent decisions by this Court, however, supported attempts by states to place out-of-state corporations on the same footing as local corporations. For example, the Court upheld state requirements that all nonresident corporations and domestic corporations that had their principal office out of state appoint the state auditor as its agent for service of process, *St. Mary's Franco-Am. Petroleum Co. v. West Virginia*, 203 U.S. 183 (1906), and the requirement that all foreign corporations file a copy of their corporate charters with the state in order to gain access to the courts of the state, *Interstate Amusement Co. v. Albert*, 239 U.S. 560 (1916), or other requirements that were not considered "arbitrary and unreasonable terms." *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Washington Superior Court*, 289 U.S. 361, 365 (1933) (citing *Saunders*).

In addition to distinguishing between resident and nonresident corporations for venue purposes, Montana forbids an out-of-state corporation from acquiring residence for venue purposes.[2] Thus, regardless of whether a

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[2] *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972); *Truck Ins. Exch. v. Nat'l Farmers Union Property & Casualty*

(continued...)

foreign corporation has established a fixed place of business in the state or has designated an agent for receipt of service, it cannot obtain resident status in Montana. *See id.*

This unyielding distinction between resident and nonresident corporations for purposes of venue determination is coupled with what the Montana courts candidly describe as an "open door" policy.[3] This policy permits plaintiffs residing outside Montana to use the Montana courts as a forum to sue non-Montana defendants, even when the injury occurred elsewhere.[4]

Consequently, an out-of-state corporation can be sued in any one of the 56 counties in Montana. An out-of-state corporation may be sued there: by an in-state plaintiff whose injury occurred in another Montana county; by an in-state plaintiff whose injury occurred in another state; by an out-of-state plaintiff with an in-state injury; or by an out-of-state plaintiff with an out-of-state injury. The scope of venue in Montana is unlimited even if all plaintiffs, all defendants, all legal counsel, or even all witnesses are located out-of-state. The alteration of one element, however -- so that the defendant is an in-state corporation --

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[2] (...continued)
Co., 149 Mont. 387, 427 P.2d 50 (1967); *Hanlon v. Great N. Ry.*, 83 Mont. 15, 268 P. 547 (1928).

[3] *See, e.g., Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 521 (1989); *State ex rel. Burlington N. R.R. v. Eighth Judicial Dist. Court*, 229 Mont. 325, 746 P.2d 1077 (1987).

[4] The imposition on out-of-state railroads is exacerbated by the fact that the Montana legislature has also eliminated the doctrine of *forum non conveniens* for defendants in actions filed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) ("FELA"). MCA § 25-2-201 (1989); *see Haug v. Burlington N. R.R.*, 770 P.2d at 521. Thus, FELA plaintiffs from all over the northwest are invited to select a favorable Montana county in which to sue railroads, such as Burlington Northern, leaving the railroads with no means of effectively objecting to a blatantly inappropriate or inconvenient forum.

changes the venue requirements for all of the above examples. If the defendant is an in-state corporation, the plaintiff may *only* bring the action in the county where the corporation resides or where the injury occurred. MCA 25-2-118; 25-2-122 (1989); *see also Siefert v. Gehle*, 133 Mont. 320, 323 P.2d 269 (1958).

This disparity of treatment protects all in-state corporations from the state-wide forum shopping imposed on out-of-state defendants. The nonresident corporation is thus denied equal protection from statewide forum shopping afforded to all in-state corporations.[5]

B. The Discrimination in Venue Invites Forum Shopping Against Out-of-State Corporations

The impact of liberal venue provisions on the nonresident corporation should not be underestimated. Many trial lawyers consider venue critical to the outcome of litigation.[6] It often will determine: who the judge will be and the degree of judicial tolerance that will be exercised, who the jury will be and how sympathetic they are to a particular defendant, the relative burden and expense of the litigation,[7] the evidence that may be admitted, and the length of

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[5] The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

[6] *E.g.*, Marvin M. Salenger, *Litigation & Administrative Practice Course Handbook Series Litigation: The Management and Trial of a Medical Malpractice Case* (1990); 3 Am. Jur. *Trials* § 22 (1965); Stacy Adler, *Forum Can be Deciding Factor in Coverage Suits*, Business Insurance, Nov. 21, 1988, at 82.

[7] Allan R. Stein, *Erie and Court Access*, 100 Yale L. J. 1935, 1938 (1991). Stein concludes that choice of venue "decisions thus can have

(continued...)

delay until trial.[8] In sum, venue "may decide the outcome of the case."[9]

Forum shopping is widely recognized as a significant litigation weapon.[10] One commentator has suggested that it could be tantamount to malpractice in some cases if "proper" forum shopping is not pursued. Juenger, 63 Tulane L. Rev. at 572. It is also recognized as a virtual win or lose proposition in certain types of cases, such as environmental insurance coverage cases.[11]

The evolution of statutory and decisional law with respect to venue, however, has limited abuse of this weapon. Juenger, 63 Tul. L. Rev. at 556-57. Forum shopping among federal courts is limited on two fronts. This Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), drastically curtailed the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (61 Pet.) 1 (1842). By establishing that federal

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[7] (...continued)
enormous impact on the litigants even though they may not necessarily affect the underlying claim." *Id.*

[8] BNA, *Civil Trial Manual Practice Series* 21:241 (1987).

[9] *Id.*

[10] Forum shopping is defined as a tool used by plaintiffs to gain a pre-litigation advantage over a defendant. *Black's Law Dictionary* 655 (6th ed. 1990); *see also* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 573 (1989) ("The plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage") (quoting Collins, *Contractual Obligations -- The EEC Preliminary Draft Convention on Private International Law*, 25 Int'l & Comp. L.Q. 35, 36 (1976)).

[11] *See* Peter J. Kalis & Thomas M. Rieter, *Examining Choice-of-Law and Choice-of-Forum Issues Before Litigating Environmental Insurance coverage*, 2 Envtl. Claims J. 165 (1989-90); Adler, Business Insurance, at 82 ("choice of forum 'is where most of the shooting is going on'") (quoting insurance coverage attorney Peter Kalis).

courts must apply state substantive law to cases brought under diversity jurisdiction, *Erie* required application of the same law to all persons, regardless of their citizenship, and thus eliminated most of the incentives for forum shopping in federal courts. Moreover, the federal transfer provisions reduce the harassment value of forum shopping in federal courts. A federal court may transfer an action from one district court to another, for the convenience of the parties, even when venue was proper in the first court. 28 U.S.C. § 1404 (1988).

Erie, however, did not affect state-to-state forum shopping. Forum shopping abuse by litigants choosing among states continues, but is limited by state venue rules and forum non conveniens principles. Montana, however, does not have such a restraint. Its "open door" policy encourages state-to-state forum shopping. *See* note 3, *supra*.

Montana, not satisfied with its "open door" policy, however, also offers plaintiffs the "any county" option, which encourages county-to-county forum shopping. Montana's statute operates to discriminate in this manner, however, only against out-of-state corporations -- those with no vote or voice in its legislative enactments.

In-state forum shopping is recognized as frequently determinative of verdicts in areas of contingency fee driven litigation. Juenger, 63 Tul. L. Rev. at 556 ("Especially in tort cases, venue often determines the size of a verdict because the generosity of juries varies from one location to another"). It is natural, therefore, that lawyers will migrate toward courts that produce the highest verdicts and have the least demanding procedural rules, "the most lopsidedly pro-plaintiff procedural rules, the laxest scrutiny of attorney's fees." Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82 (1991).

Yet the Montana legislature and courts have not attempted to provide a rational basis for inflicting this

forum shopping solely on out-of-state corporations. Especially in the case of foreign corporations that have registered to do business in the state or appointed an agent for purposes of service of process,[12] such discrimination is not only unwarranted, but unconstitutional.

The Court's decision in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), established that states may not discriminate with respect to venue between resident corporations and nonresident corporations that have a registered agent and a fixed place of business in the state. In *Saunders*, the Court confronted facts remarkably similar to those in the pending case. The Arkansas venue provision allowed suit against a nonresident to be brought in any county, while strictly limiting the possible choices of venue against residents. 274 U.S. 492-93. Like Burlington Northern, the defendant in *Saunders* was incorporated and had its headquarters out of state, but had a fixed place of business in the state and a designated agent for service of process. When the plaintiff in *Saunders* was injured at the defendant's place of business in Arkansas, he brought suit in a county with no connection to the lawsuit. Striking down the Arkansas venue statute as violative of the Equal Protection Clause of the Fourteenth Amendment, the Court observed: "[t]here is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person." *Id.* at 494. Application of established precedent requires invalidation of the Montana venue statute on the same grounds.[13]

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[12] All but seven states have adopted provisions modeled after the Model Business Code's section 15.07 requiring nonresident corporations to maintain a registered or principal office and a registered agent in the state. The remaining seven jurisdictions require some sort of designated office or agent for service of process as well. Model Bus. Corp. Act Ann. § 15.07 (1991 Supp.).

[13] Indeed, many other states have declared their own venue schemes unconstitutional on the basis of *Saunders*, or revised their venue rules

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II. MONTANA'S DISCRIMINATORY VENUE PROVISIONS IMPOSE INEQUITABLE COSTS ON OUT-OF-STATE CORPORATIONS AND DISTORT TORT LIABILITY COMPENSATION PRINCIPLES

Forum shopping exploits disparities in the rights of parties litigating identical claims in different states or even different counties. This litigation technique raises costs to litigants and the courts. Under Montana's venue statute, however, which discriminates only against out-of-state defendants, the costs are generally imposed outside of Montana.

The effects of Montana's venue statute, as applied, are invidious. The imposition of statewide forum shopping establishes an environment conducive to the infliction of parochial prejudices against out-of-state corporations. If a defendant happens to be a distant large corporation, sued in a county remote from its principal place of business in Montana, local juries possess little incentive to deny a plaintiff an unjustifiably high recovery.

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[13] (...continued)
or interpretations of residency in order to conform to the *Saunders* standard. *See Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977); *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Commercial Carriers, Inc. v. Matracia*, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (*en banc*); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939); *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936); *see also* Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Neb. Rev. Stat. § 25-403.02 (1989); Or. Rev. Stat. § 14.080 (1989); Ala. Const. Art. XII, § 232 (achieving the same result by constitutional amendment).

The tendency to award inflated damages from out-of-state companies to injured plaintiffs persists unchecked by local economic concerns. A jury in a small community will tend to avoid bringing a particularly harsh result upon its own residents or businesses.[14] No apparent harms will be visited upon local residents, however, from assessing exorbitant rewards against out-of-state defendants.

Venue provisions that attract large jury verdict litigation solely against out-of-state corporations allow any resulting harms from such litigation to fall on distant and virtually anonymous businesses. The state suffers little or no harm in the form of loss of jobs, loss of industry, or loss of tax base from the award of high money verdicts. To the extent economic consequences are ultimately experienced at the out-of-state corporation's operations in the state, they are felt in another county, most likely where the principal place of business in the state is located.

It has long been recognized that "litigation instituted in an inappropriate forum . . . proceeds deliberately from a desire to sue where verdicts are largest . . . " Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 34 (1929). As one commentator has suggested:

> The value of getting into the right court is quite tangible. Some years ago an experienced injury lawyer was quoted as saying that injury cases with identical facts could bring expected damage awards ranging from $10,000 to $2,000,000 depending on the jurisdiction in which they were filed. . . . Often an otherwise valueless claim acquires settlement value if it can be brought in a dangerous court district. . . .

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[14] Stephen Susman & Martha Evans, *Prosecuting the Common Law Lender Liability Case*, 468 PLI/Comm. 53 (1988); *see also* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 45 (1988).

Olson, *The Litigation Explosion* 82.

> Even more to the point, the courts that frown on forum-shopping tend to be the ones where no one wants to shop because they protect defendants' rights in other ways too. The courts most apt to favor plaintiffs are likewise the ones inclined to open their doors to all comers. Some, like the fabled New Orleans saloons that never close, have practically taken those doors off the hinges.

Id. at 85-86.

Forum shopping among counties within a state will inexorably lead to several harmful results: (1) it causes the overburdening of certain courts perceived to be "friendly" to the claims brought or to large fee awards;[15] (2) it creates unnecessary expense in the judicial system as plaintiffs file suit in the most favorable court, rather than the simplest or closest;[16] and (3) it creates the perception that some courts are "fairer" than others.[17]

Montana's encouragement of forum shopping by plaintiffs against out-of-state corporations has produced these effects. Most of the FELA litigation is centered in only two counties, Yellowstone and Cascade. As these counties

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[15] *See* Blair, 29 Colum. L. Rev. at 34; *see also* Melody Perkins, *Judges Reduce Civil Trials to Cut Costs*, Great Falls Trib., Mar. 10, 1990 (judges vacating civil trials in Cascade County, Montana, to reduce court budget deficit).

[16] *See, e.g.*, 135 Cong. Rec. E2243 (daily ed. June 21, 1989) (statement of Rep. Luken) ("The losers from [forum shopping] are the American public who end up paying excessive legal fees that are silently encapsulated in the price of products.")

[17] *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *Erie*, 304 U.S. at 73-74.

achieve recognition as pro-plaintiff havens by the contingency fee bar, additional litigation has followed.

As a result of this regional concentration of litigation in one or two counties, out-of-state corporations will be subjected to higher and higher litigation costs and increased settlement costs because of the unequal treatment under the venue statute. Montana's venue scheme promotes a distortion in the tort liability system by disproportionately burdening out-of-state corporations with these costs.

Such discrimination against out-of-state corporations can be freely waged because, as nonresidents, these defendant corporations lack domestic political clout. They lack any significant voice in the state legislative processes. Elected public officials, state legislators, and state court judges possess a political self-interest in protecting in-state residents. Justice Neely of the West Virginia Supreme Court of Appeals refers to this as "an exercise in economic self-defense."[18] He further discusses this point in his book:

> The problem is entirely political: the logic of collective action implies that no one state or group of states will undertake to act responsibly to curtail off-line wealth redistribution, given the irresponsibility on the part of neighboring states. . . . As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

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[18] Testimony of Justice Richard Neely at 8, *in* Hearings on S. 640 Before the Senate Commerce Committee, 102d Cong., 1st Sess. (Sept. 12, 1991).

Richard Neely, *The Product Liability Mess*, at 4. Justice Neely explains the political dynamics of state court systems in which judges are elected: large verdicts are awarded in favor of local plaintiffs against out-of-state corporate defendants; the local plaintiffs' lawyers take their one-third contingency fees from the jury awards; the lawyers contribute part of their income to the re-election campaigns of the state trial judges; more cases are brought on behalf of more plaintiffs before the same judges, and the cycle continues. *See id.* at 24-25, 62-63 (relating fundraising process to the behavior of state court judges). This process all depends, of course, on the first step. The opportunity to rule against outsiders allows state officials to "redistribute money from people who live in other states to their own constituents." Olson, *The Litigation Explosion* at 87.

The costs of the local largesse afforded by a venue statute that discriminates against nonresident corporations are borne by those nonresident corporations in the first instance. In many cases, large verdicts are then absorbed by the corporations' liability insurance carriers, often resulting in increased premiums. Eventually, however, those costs are passed on to the consumer in the form of increased prices. The public pays the costs of the Montana permissive venue scheme.

While the plaintiff may "win" by forum shopping, the public "loses." Forum shopping results in congested court calendars, causing other suits to be unnecessarily delayed.[19] Local taxpayers must bear the burden of paying for a judicial system abused by outsiders.[20] Perhaps even more

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[19] *See supra* note 15.

[20] *See id.*

disturbing, forum shopping "'demeans the entire judicial process' of adjudication."[21]

The Montana venue statute subjects only out-of-state corporations to this discriminatory treatment, while shielding its in-state corporations from this same treatment. Legislators possess no incentive for fairness in devising these statutes, so the voice for out-of-state corporations must come from this Court. Furthermore, if this Court sanctions Montana's version of a venue law singling out foreign corporations for wide-open forum shopping, then other states are likely to follow. Whether by legislation or judicial interpretation, these other states will have a powerful incentive to adopt similarly discriminatory venue rules in order to favor their local plaintiffs in cases brought against out-of-state corporations. As Justice Neely demonstrates, state court tort litigation across the nation involves a "race to the bottom." Judges (particularly elected judges), tend to adopt pro-plaintiff legal rules, precisely because such rules redistribute wealth to local residents (constituents in the case of the elected judges) from out-of-state corporations with no local clout. Neely, *The Product Liability Mess*, at 70-72. Once a few states have adopted a particular pro-plaintiff rule, others inevitably follow, in order to ensure their residents an equal share of the litigation pie. *Id.* at 73-75 (drawing analogy to unconstitutional attempts of states to tax interstate commerce). Venue laws that discriminate against foreign corporations are a perfect candidate for this downward spiral. Thus, it is highly likely that if this Court removes *Saunders* as a barrier to such discriminatory laws, multiple states will move to adopt them.

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[21] Yolanda Eleni Stefanou, *Concurrent Jurisdiction Over Federal Civil RICO Claims: Is it Workable? An Analysis of Tafflin v. Levitt*, 64 St. John's L. Rev. 877, 897 (1990) (quoting *Commission on Revision of Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 220 (1975)).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

Respectfully submitted,

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Dated: March 12, 1992